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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1874

DAVID L. JONES, SECRETARY OF THE
NORTH CAROLINA DEPARTMENT OF CORRECTIONS,
RALPH EDWARDS, COMMISSIONER OF THE
NORTH CAROLINA DEPARTMENT OF CORRECTIONS,

Appellants

v.

NORTH CAROLINA PRISONERS' LABOR UNION, INC.,
ON BEHALF OF ITSELF AND ALL ITS MEMBERS,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

BRIEF FOR APPELLANTS

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NO. 75-1874

DAVID L. JONES, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTIONS, RALPH EDWARDS, COMMISSIONER OF THE NORTH CAROLINA DEPARTMENT OF CORRECTIONS,

Appellants,

v.

NORTH CAROLINA PRISONERS' LABOR UNION, INC., ON BEHALF OF ITSELF AND ALL ITS MEMBERS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLANTS

OPINION BELOW

The Memorandum Decision of the Three-Judge District Court for the Eastern District of North Carolina is reported at

409 F. Supp. 937 (E. D. N. C. 1976). A copy of the Memorandum Decision dated March 16, 1976 may be found on page twenty of the Jurisdictional Statement. A copy of the Judgment dated April 8, 1976; and a copy of the Notice of Appeal filed April 26, 1976 are incorporated in the Jurisdictional Statement at pages thirty-three through thirty-five.[1]

JURISDICTION

This suit was brought by the Appellee, North Carolina Prisoners' Labor Union, Inc., on behalf of itself and all its members, seeking injunctive and declaratory relief and monetary damages under the authority of 42 U. S. C. § 1983, 28 U. S. C. § § 1343 and 2201.

A Three-Judge Court was convened pursuant to 28 U. S. C. § § 2281 and 2284 to consider the constitutionality of regulations issued by the Secretary of the North Carolina Department of Correction on March 26, 1975 which provided in pertinent part:

> No employee of the Department shall authorize the use of Departmental facilities for such organization [declaring itself to be or acting as an inmate labor organization], negotiate, bargain with, or otherwise enter into discussion with such an organization or representative of such organization nor permit such organization to hold meetings or assemble on Departmental property.

[1] The Jurisdictional Statement will be abbreviated "J. S." throughout the text of this brief.

> Persons in the custody of the Department of Correction are prohibited from soliciting other inmates about membership in any inmate union. If the officer in charge has reason to believe that correspondence between inmates concerns organization of an inmate union in violation of this rule, then the correspondence may be censored and if necessary delivery may be withheld. Any inmate accused of soliciting shall be subject to discipline for agitating and failing to obey a lawful order. The unit superintendent or his designated representative shall proceed against the inmate accused in accordance with established Departmental procedures. A copy of the entire General Policy issued March 26, 1975 may be found in the Jurisdictional Statement. (J. S. pp. 37, 38.)

The Memorandum Decision of the District Court was filed on March 16, 1976. The Judgment was filed on April 12, 1976 and Notice of Appeal was filed on April 26, 1976.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. § 1253, which authorizes an appeal from an Order of a Three-Judge Court granting a permanent injunction.

QUESTIONS PRESENTED

I. WHETHER THE FIRST AND FOURTEENTH AMENDMENTS PREVENT THE NORTH CAROLINA DEPARTMENT OF CORRECTION FROM PROHIBITING INMATE ASSEMBLY FOR THE PURPOSE OF ORGANIZING THE NORTH CAROLINA PRISONERS' LABOR UNION, INC. WHERE THE JAYCEES, ALCOHOLICS ANONYMOUS AND THE BOY SCOUTS OF AMERICA, ORGANIZATIONS

WHICH PROMOTE PROGRAMS AND HAVE BEEN DETERMINED TO MEET VALID REHABILITATIVE NEEDS, ARE ALLOWED TO MEET?

II. WHETHER THE NORTH CAROLINA DEPARTMENT OF CORRECTION CAN CONSTITUTIONALLY PROHIBIT INMATES FROM SOLICITING OTHER INMATES TO JOIN THE NORTH CAROLINA PRISONERS' LABOR UNION?

III. WHETHER THE NORTH CAROLINA DEPARTMENT OF CORRECTION IS REQUIRED BY THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, TO PERMIT THE NORTH CAROLINA PRISONERS' LABOR UNION THE PRIVILEGE OF BULK MAILING INTO THE UNITS OF THE DEPARTMENT OF CORRECTION BECAUSE THE DEPARTMENT PERMITS THAT PRIVILEGE TO THE JAYCEES?

STATEMENT OF THE CASE

Tnis is an action for declaratory and injunctive relief and monetary damages brought pursuant to 42 U. S. C. § 1983 against David L. Jones, Secretary of the North Carolina Department of Correction, and Ralph Edwards, Director of the Division of Prisons of the North Carolina Department of Correction, for alleged deprivation of rights secured by the Constitution and laws of the United States. Tne Appellee, the North Carolina Prisoners' Labor Union, Inc. (hereinafter the "Union"), claimed that the Defendants refused to allow prisoners in their custody to meet for the purpose of forming a union, or to allow union organizers to enter the prison facilities, while permitting the existence within the prison system of other inmate organizations, among which are the

Jaycees and Alcoholics Anonymous; that each of these approved organizations have chapters in numerous units and are permitted to hold meetings and have outside representatives of these organizations meet with the inmate population from time to time. Further, the Jaycees are accorded the privilege of mailing their newsletters in bulk to the various prison units at which Jaycee chapters are located.

On March 26, 1975, Appellant, David L. Jones, Secretary of the North Carolina Department of Correction, issued regulations which are quoted above. (J. S. pp. 37, 38.)

On April 25, 1975 Judge F. T. Dupree, Jr., denied the Union's Motion for Preliminary Injunction and by separate Order dated April 29, 1975, certified the pendency of an action requiring a Three-Judge Court.

On March 16, 1976, the Three-Judge Court filed a Memorandum Decision finding the Secretary's regulation to be unconstitutional and holding that (1) inmates and all other persons shall be permitted to solicit and invite other inmates to join the Union orally or by written or printed communication; (2) the Union shall be accorded the privilege of bulk mailing to the extent, and only to the extent that such a privilege is accorded other organizations; and (3) the Union and its inmate members shall be accorded the privilege of holding meetings under such limitations and control as are neutrally applied to all inmate organizations. . ." (J. S. pp. 20-32). On April 12, 1976, the Court filed a Judgment incorporating the provisions of the Memorandum Decision (J. S. pp. 33, 34) which further provided that "Free persons otherwise entitled to visitation with inmates . . . shall not be denied access to such visitation by reason of their association or affiliation with the Union."

INTRODUCTORY STATEMENT

Before beginning this Argument, we wish to point out to the Court certain disparities between the facts as interpreted by the Three Judge Court and the actual facts as they appear in the record of this case. First, the Union presented itself to the Three Judge Court as a reform organization that had no intention of collectively bargaining with prison officials to obtain more favorable conditions. This definition of the "Union" was elicited from counsel for the Union by questioning from the Three Judge Court. The Court accepted the definition as presented inspite of the fact that the organization had called itself a "Union" from the beginning.[2] Also, in its newspaper dated December 1975, long after the "Union" had begun this litigation, it listed as one of its proposed goals the following:

> Prisoners should be encouraged to organize for the right to collectively bargain for better conditions, higher wage scales, and for their own personal well-being. (See p. A-1, Infra.)

On another page of that same newspaper, (See p. A–1, infra.), there was a space where inmates were requested to "authorize the agents or representatives of said Union to represent [the inmate] and to act as collective bargaining agent in all matters pertaining to rates of pay, hours of employment and all other terms and conditions of incarceration." Finally, in its Newsletter No. 1 attached to the complaint, the Union acknowledges a $1,000 contribution from the "North Carolina AFL-CIO". It seems clear then, that

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[2]See certificate of Incorporation in the record.

the Union did think of itself as a bargaining unit. Nevertheless, we do not feel compelled to elaborate further on this particular misconception. As we will show, it is not necessary to determine whether the proposed organization is a "reform organization" or a "Union" to determine whether the State must recognize it.[3] We point out the misconception only to explain to this Court that the lower court misunderstood the issues before it.

This lack of understanding was most evident in the lower court's finding that the State "permits inmates to belong to a corporate union or organization." (J. S. p. 27.) When the State drafted its regulation prohibiting inmate labor unions, it was aware of "the conflicting considerations that should influence particular decisions in this area."[4] It recognized a right of outside individuals, specifically those in charge of the office of the North Carolina Prisoners' Labor Union in Durham, North Carolina, to communicate their beliefs to *individual prisoners*:[5] It recognized the right of each

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[3]If it is a "Union", N. C. G. S. §95-98 provides that "Any agreement . . . between any agency, instrumentality, or institution in the State of North Carolina, and any labor union, trade union, or labor organization as bargaining agent for any public employees of such . . . agency or instrumentality of government is hereby declared to be against the public policy of this state, illegal, unlawful, void and of no effect." Cf. *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W. D. N. C. 1969).

[4]See *Morales v. Schmidt*, 494 F. 2d 85, 87 (7th Cir. 1974) (Stevens, J., concurring). Then Judge Stevens expresses the idea that prison regulations restricting First Amendment rights of prisoners that are carefully drafted with a clear awareness of the conflicting interests involved should be presumed valid.

[5]See Mail Regulations (A pp. 133-138).

individual prisoner to believe whatever he chooses. Even if the State had sought to prohibit beliefs, it clearly could not have done so. Such a prohibition would obviously be unenforceable. The Department never acquiesced to *any* functional organization of prison inmates within the walls of the State's prisons. In fact, the regulations clearly prohibited solicitation and assembly and made both disciplinary offenses. *The regulations involved granted inmate members of the "Union" only the right to believe–nothing more.* The State acted in good faith–it based its regulation on an objective evaluation of the law. The lower court mistakenly construed this good faith effort as a concession that the *Union* posed no security problems. Its decision totally discounted the fears and concerns of prison administrators and the express prohibitions in the state regulations. We will show that the Three Judge Court offered a simplistic solution to a "very important issue that deserves more than cursory analysis."[6] In fact, the decisions of this Court, misread by the lower court, *require* more than cursory analysis. We will show that concerns voiced by correctional officials in this case and previously recognized many times by this Court require reversal in this case.

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[6]See *Paka v. Manson*, 387 F. Supp. 111, 115 (D. Conn. 1974). In *Paka*, plaintiff prisoners sought to form "an organized group of elected representatives of inmates within the prison to meet together, and to take their proposals, criticisms, suggestions and the like to the administration." Such a reform group is equivalent to the "Union's" current definition of its organization. As will be discussed in detail, the Court found that the State could prevent organization of the Union. Accord, *Blue v. Hogan*, Civil Action No. C 76 1160 A (N.D. Ga. September 21, 1976).

SUMMARY OF ARGUMENT

THE NORTH CAROLINA DEPARTMENT OF CORRECTION IS NOT CONSTITUTIONALLY OBLIGATED TO RECOGNIZE THE NORTH CAROLINA PRISONERS' LABOR UNION. THE DEPARTMENT'S REGULATIONS THAT PROHIBITED MEETINGS OF THE UNION AND SOLICITATION OF INMATES BY OTHER INMATES WERE NOT UNCONSTITUTIONAL.

I. WHEN DETERMINING WHETHER PRISON RULES AND REGULATIONS ARE CONSTITUTIONALLY VALID, THE FEDERAL COURTS MUST ALLOW PRISON ADMINISTRATORS WIDE LATITUDE.

The Federal Courts are obligated to allow Prison Administrators "wide latitude in anticipating probable consequences of allowing certain . . . practices." *Procunier v. Martinez*, 416 U. S. 396, 404, 405 (1974). The prison administrators involved in this case have submitted several valid reasons for refusing to recognize prisoner's Union. Briefly they are the following:

1. The inmate Union would create friction between inmates and staff.

2. Long term inmates with different interests than short term inmates might force their interests on others creating a possibly uncontrollable situation. Thus some inmates will become "big wheels" with special authority, special rights, and special powers.

3. When an organization of prison inmates has no bargaining power, its only source of strength is militancy. Strikes or riots are likely to occur when officials refuse to deal with inmates.

The decisions of this Court clearly indicate that Federal Courts are required to respect the opinions of prison administrators when they are supported by reason and logic. The Three Judge Court failed to give any weight to these considerations in spite of this Court's mandate.

II. THE ANALYSIS EMPLOYED BY THE LOWER COURT IN THIS CASE WAS INCONSISTENT WITH PELL v. PROCUNIER, 417 U.S. 817 (1974).

In *Pell*, this Court held that challenges to prison regulations restricting First Amendment Rights

> "must be analyzed in terms of legitimate policies and goals of the corrections system . . . central to all corrections goals is the institutional consideration of internal security within the corrections facilities themselves. . . *Pell v. Procunier*, 417 U.S. 817, 822, 823 (1974)."

The Court went on to hold that an absolute prohibition of face to face interviews between press representatives and individual specifically named inmates that they requested to interview did not violate the constitutional rights of the prisoners. The principle security concern expressed by correctional officials in *Pell* and the companion case, *Saxbe v. Washington Post*, 417 U. S. 843 (1974), was that certain inmates might become "big wheels" as a result of interviews. They then could use their status to encourage others to violate institutional rules. The absolute ban was upheld in "light of the alternatives means of communication permitted under the regulations."

It is obvious that the "big wheel" becomes much more dangerous when he is able to organize a group of underlings to support him and enforce his demands. Thus the security interests expressed in this case are even more urgent than those expressed in *Pell*. Also, the Department of Corrections provides inmates with alternative methods of communication. They may write to anyone, and they are allowed visitors consistent with security requirements. Reporters are allowed to interview specific inmates that are willing to talk with them subject only to time, place, and manner restrictions. The inmates are also provided with an internal grievance mechanism subject to outside review. For these reasons, *Pell v. Procunier* controls this case. Still, the Three Judge Court gave no weight to *Pell*. Again, its failure to do so was unmistakingly erroneous.

III. THE STATES REFUSAL TO PERMIT MEETINGS AND SOLICITATION OF MEMBERS BY THE NORTH CAROLINA PRISONERS' LABOR UNION DID NOT DEPRIVE THE UNION OF EQUAL PROTECTION OF THE LAWS.

> "Despite the tendency of all rights to declare themselves absolute to their logical extreme, there are obviously limits beyond which the equal protection analysis may be pressed without doing violence to the principles recognized in other decisions of this Court." *Ross v. Moffitt* 417 U. S. 600, 612 (1974).

Since the decision of the Three Judge Court is patently inconsistent with *Pell v. Procunier*, the Union's equal protection claims is without merit.

Further, the fact that the State allowed the Jaycees, Alcoholics Anonymous, and the Boy Scouts of America to

meet and organize within its prisons did not require the State to recognize a Prisoners' Labor Union. All three recognized organizations have positive goals relative to productive restoration of offenders to active, lawful participation in the community. The goals of these organizations have been scrutinized, evaluated, and approved by prison officials. All three organizations facilitate the rehabilitation of offenders. At best, a prisoners' union provides an unnecessary means of communicating prisoner's complaints to officials. Prison officials cannot be forced to accept the security risks inherent in such a union in order to provide this unnecessary alternative. Admission of certain organizations does not leave the State powerless to bar other types of organizations.

IV. THE STATES' REFUSAL TO ALLOW MULTIPLE DISTRIBUTION OF THE NEWSPAPER OF THE PRISONERS' LABOR UNION WAS NOT UNCONSTITUTIONAL.

For the reasons cited above, the union has no right to actively function within a prison. *A fortiori*, it has no right to distribute its leaflets. Widespread circulation of the union publications can provide a base for collective action such as strikes or riots. Distribution to a group of inmates forcefully raises the risk of agitation and unrest that prison administrators may legitimately seek to combat.

ARGUMENT

I. THE FIRST AMENDMENT AND FOURTEENTH AMENDMENT DO NOT REQUIRE THE NORTH CAROLINA DEPARTMENT OF CORRECTION TO ALLOW INMATES TO ASSEMBLE AND SOLICIT OTHER INMATES FOR THE PURPOSE OF ORGANIZING A PRISONERS' LABOR UNION.

(A) WHEN DETERMINING WHETHER PRISON RULES AND REGULATIONS ARE NECESSARY FOR THE MAINTENANCE OF ORDER AND SECURITY, THE FEDERAL COURTS MUST ALLOW PRISON ADMINISTRATORS WIDE LATITUDE.

The problems of prison management have been described by this Court as "complex and intractable, . . . not readily susceptible of resolution by decree." *Procunier v. Martinez* 416 U. S. 396, 404, 405 (1974). Thus, federal courts are obligated to allow prison administrators "wide latitude in anticipating the probable consequences of allowing certain . . . practices." *Id.* In *Preiser v. Rodriquez*, 411 U. S. 475, 491, 492 (1973), Justice Stewart remarked that "it is difficult to imagine an activity in which a state has a stronger interest or one that is more bound up with state laws and regulations than the administration of its prisons." This Court again indicated its deference to prison officials when it held due process inapplicable to transfers between prisons absent state statutes or regulations mandating them. The Court refused to

> "place the [Due Process] Clause astride the day to day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges . . . The

> federal judges do not supervise state prisons, the administration of which is of acute interest to the state." *Meachum v. Fano*, ____ U.S. ____, 96 S. Ct. 2532, 2540, 49 L. Ed. 2d 451, 461 (1976)

Meachum means that the federal courts are not to assume the role of "super wardens" of state prison facilities. *Cooper v. Riddle*, 540 F. 2d 731, 732 (4th Cir. 1976). The Chief Judge of the United States of Appeals for the Second Circuit has warned that:

> Federal judges should keep in the forefront of their minds, when passing on the acts of government officials, that they have not been vested with executive or legislative power rather than rush to impose their supposedly superior knowledge on all sorts of questions, upon the duly appointed officials who have lived with the problems and have been given responsibility to deal with them. Failure to observe such self limitation will ultimately have most serious consequences. *Goodwin v. Oswald*, 462 F. 2d 1248, 1251 (2d Cir. 1972) (*Friendly, C.J.*, dissenting).

The precedents cited above clearly indicate that this Court has required federal courts to respect the opinions of prison administrators when they are supported by reason and logic. Defendant David L. Jones, Secretary of the Department of Correction, expressed his opinion on the formation of a prisoners' union in his affidavit.

> The existence of a union of inmates can create a divisive element within the inmate population. In a time when the units are already seriously overcrowded, such an element could aggravate already tense conditions. The purpose of the Union

> may well be worthwhile projects. But it is evident that the inmate organizers could, if recognized as spokesman for all inmates, make themselves to be powerful figures among the inmates. If the Union is successful, these inmates would be in a position to misuse their influence. After the inmate Union has become established, there would probably be nothing this Department could do to terminate its existence, even if its activities became overtly subversive to the functioning of the Department. Work stoppages and mutinies are easily foreseeable. Riots and chaos would amost inevitably result. Thus, even if the purposes of the union are as stated in the Complaint, the potential for a dangerous situation exists, a situation which would not be brought under control. Thus, my responsibilities to the people of North Carolina, to the employees of the Department of Correction, and to the inmates themselves necessitate that this Department refuse to recognize the legitimacy of the union. . . (A pp. 119, 121).

Mr. Ralph D. Edwards, Director of the Division of Prisons, added in his Affidavit that based on his observations and experiences in corrections:

> The creation of an inmate union will naturally result in increasing the existing friction between the inmates and prison personnel. It can also create friction between union inmates and nonunion inmates. Furthermore, the interests of all inmates are not the same. Those inmates with long term sentences do not have the same needs and goals of those of short term inmates. It is quite possible that inmates with long term sentences would take over a union to the detriment of the prison system and

persons within its custody. If a union is permitted to be organized within the prison system, a potentially uncontrollable situation will result. Even if the purposes of the union are peaceful and productive at the outset, abuse of the organization can result in a Frankenstein's monster which cannot be put down. It will enable certain inmates to establish themselves as "big men" within the prison system. They will be power figures whom other inmates believe to have special authority, special rights, and special powers. Propelling an inmate into such a position would create a hazardous situation. The security of the system itself and of the persons confined in it would inevitably be in danger. If the union maintains a foothold, there would be virtually no way to control it. (A pp. 123, 128).

In addition, the State offered a book written by Peter Remick, an inmate incarcerated at Walpole Prison in Massachusetts.[7] The book told a horrendous story of destruction of life and property at the Prison caused in large part by a union organization of inmates. In opposition to these opinions, the Union offered the depositions of James W. Mullen, Warden of the Adult Correctional Institution for the State of Rhode Island, and Mr. Paul Keve, Director of Adult Corrections for the State of Delaware. Warden Mullen expressed fear about the possible consequences of union organization.[8]

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[7] Remick, Peter. *In Constant Fear*. (Reader's Digest Press 1975)

[8] In his deposition, Warden Mullen testifies:

Q: Do you find any exploitation of one group of inmates by another, say the younger inmates exploited by the older inmates, or the long-termers exploiting the short termers?

A: We had the young inmates break away from the older inmates, and to us, the two words that were mentioned, the

young inmates wanted to form what was called the Youth Commission, and they wanted to break away from the, what they called the over the hill gang.

Now, This is gospel truth, and this happened within the last year. The unfortunate part about it, that the young inmates didn't realize how super-violent, or they didn't believe what they read or heard about some of the older guys.

We had 40 members of the Young Commission stabbed. There was no more Youth Commission, no more problems. People had been arrested and charged within the institution, and that has been the end of any of that type of thing. We did have these young guys attempt to break loose from the older inmates by verbal threats or by verbal abuse, and they were handled by the older inmates without regard to prosecution or whatever. It was done openly and it was done in 5 minutes. The Youth Commission was in ruins.

Q: When you say the older inmates, would you also characterize them as the Reform Association?

A. I would say so, because my experience with them, you know, they've been through the training schools, they've been here before. They have served time in other prisons, yes.

Q. So in other words, any time you have a maverick organization, the organization which pre-exists, will attempt to quash it?

A: Yes, sir. (A pp. 69, 70).

Warden Mullen, whom the Three-Judge Court characterizes as an expert who has concluded that the National Prisoners' Reform Association at his institution "is going in a positive direction" further testifies, concerning the North Carolina situation as follows:

A: . . . [t]hat as far as the union is concerned, I, you know, I think it's dangerous, and again, I only——I can't discuss my situation, because I only can talk about 600, and you're talking about 13,000.

I think in looking at the picture of that situation, you know, at any given moment, through any type of

Mr. Keve had no opinion.[9]

In some instances, the fear of prison administrators in the record of this case was based on concrete facts–i.e., riots

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communication, you could have your hands full. If the word was given that a prison in Raleigh that––I don't even know if there is one there––that at 12:00 tomorrow, boys, we don't move. We just sit there. The State of North Carolina is in big trouble. You know, you'd have to get the Army to straighten it out for that violence in such an area, so spread out, you know, in that span, you know. It scares me.

The situation here, you know, it's a little different. The State Police Barracks is right here. The National Guard Armory is 3 miles away. So, you know, I'm working at an entirely different ballgame. I think if you ever had anything that was organized, I don't think you'd have––well, I wouldn't say 13,000 people go beserk at once, because you're not going to get 100% from everybody, but I do think that looking along the lines of the type of facilities that you have, and I don't know the type of units and special offenders prison, I don't know. I think you'd have some super problems.

(A pp. 73, 74).

[9]In his deposition, Paul Keve testifies:

Question: What is your view in general towards the organization or the existence of inmate organizations similar to the plaintiff organization as you understand it? Do you have an opinion:

Answer: Yes. I have some opinions. There are all kind of inmate organizations and inmate organizations of one kind or another have existed for a long time, but the idea of the Union as a specific kind of organization is very very new. *And at this time it has not proven itself very well one way or the other in the general field of corrections.* (Emphasis added.)

(A pp. 79, 81).

that have occurred in the past.[10] Others are based on logic and common sense. Obviously, where an inmate organization has no bargaining power, its only source of strength is militancy. This Court has recognized that prisoners employ "illegal and very violent means to obtain their ends" *Wolff v. McDonnell*, 418 U. S. 539, 560 (1974). Cf. United States ex rel *Miller v. Twomey*, 479 F. 2d 701, 716 (7th Cir. 1973); and that "it is against this background that constitutional judgments must be made." *Id.* The fears of Secretary Jones and Director Edwards are not unfounded and this Court should not interfere with their legitimate attempts to prevent disorder.

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[10]Although Mr. Keve supports "the Union model" in corrections, he describes the causes of the riot at Central Prison in Raleigh, North Carolina, on April 18, 1968, as follows:

Q: You are aware that the riot occurred when Mr. Bounds was attempting to regain control from the so-called "bulls of the yard." The prison bosses, are you not?

A: Yes.

Q: And that a very sophisticated business has been developed by a few individuals at Central Prison?

A. Right.

Q: And that when Mr. Bounds attempted to take away an extremely profitable business from the individuals they completely took control over the inmate population and resulted in a riot?

A: Right.

Q: Is this not an example of what can happen when certain prisoners gain power in a penal institution?

A: Yes, it is an excellent example of that.

Q: And their power was for personal aggrandizement rather than the good of the institution?

A: That is right.

(A pp. 79, 102).

(B) THE ANALYSIS EMPLOYED BY THE LOWER COURT IN THIS CASE IS INCONSISTENT WITH PELL V. PROCUNIER, 417 U. S. 917 (1974).

In *Pell*, this Court held that California's absolute prohibition to face to face interview between press representatives and individual specifically named inmates that they requested to interview did not violate the constitutional rights of the inmates involved. This Court began its analysis by stating the "familiar proposition that lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Pell,* supra, at 822 citing *Price v. Johnston*, 334 U. S. 266, 285 (1948). The Court then acknowledged that a prisoner retains certain First Amendment rights "not inconsistent with his status as a prisoner or with the legitimate penological objectives of the penological system." *Ibid.* Thus, challenges to prison regulations restricting First Amendment rights "must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law." Two of the goals discussed are rehabilitation of prisoners and internal security of prisons.

> . . . Since most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody. Finally, central to all corrections goals is the institutional consideration of internal security within the corrections facilities themselves. *Id.* at 823.

Again, the Court reemphasized that "it is in light of these legitimate penal objectives that a court *must* assess challenges

to prison regulations based on asserted constitutional rights of prisoners." *Ibid.* (Emphasis added.)

For the reasons explained in detail below, we believe that the Three Judge Court totally disregarded the institutional goals of security and rehabilitation. Apparently, the principle security concern advanced by California correctional officials in *Procunier* and federal correctional officials in the companion case, *Saxbe v. Washington Post*, was the so-called "big wheel" phenomenon. See *Saxbe v. Washington Post,* 417 U.S. 850, 868 (1974) (Powell, J., dissenting). Officials argued that inmates allowed interviews with press representatives might obtain notoriety and status among their other fellow inmates. As leaders, they could encourage others to violate institutional rules. California officials also specifically mentioned that a riot that had occurred at San Quentin might have been caused by reporters' interviews with the "big wheels" within the population who used their status to organize the rioters. This Court recognized that the fears expressed were "legitimate" and upheld the absolute ban in "light of the alternative means of communication permitted under the regulations."[11] *Pell,*

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[11] The following reasonable and effective means of communication are available to the inmates of the North Carolina Department of Correction:

(1) Visitation:
5 N C A C 2 D.0201 GENERAL
(a) Introduction. Visiting performs a vital function in the rehabilitative process and should be as free and open as custodial considerations permit. Inmates should be encouraged to maintain close contact with members of their families, desirable friends, and others through visitation privileges.

(2) *Correspondence:*
5 N C A C 2 D.0301 *Inmate Use of the Mails*
(a) Inmates may write to anyone . . .

Supra at 823 citing *Kleindeinst v. Mandel*, 408 U. S. 753, 765 (1972). Justice Powell dissented due to his concern over the right of access by members of the press. He specifically noted, however, even though the Bureau would "be put to a heavy burden of justification" for barring reporters

> It does not follow that the Bureau is under the same heavy burden to justify any measure of control over press access to prison inmates. Government regulation that has no palpable impact on the underlying right of the public to the information needed to assert ultimate control over the political process is not subject to scrutiny under

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(3) *Public Communications*
5 N C A C 2 D.0502 *Access Procedure*
(d) To Prisoners

(1) Visitors may be permitted to talk to inmates of the State prison system who are willing to talk to them. The time, place, and manner of such conversations shall be subject to restrictions appropriate to the parties and circumstances.

(2) Media representatives may be permitted to interview inmates of the State prison system who consent in writing to be interviewed for a stated purpose and without compensation . . . .

(4) *Inmate Grievance Procedures*
N. C. G. S. §148-101 et seq., *Inmate Grievance Commission*
The Inmate Grievance Commission is established as a separate agency within the Department of Correction. It shall consist of five members appointed by the Governor from a list of 10 persons recommended by the Council of the North Carolina State Bar. . . .

5 N C A C 2G.0301 *General*
The Inmate Grievance Procedure is designed to provide efficient administrative procedures for the resolution of complaints. The Division of Prisons seeks to reduce tension and provide a stable rehabilitative atmosphere by providing formal channels for communication of complaints. . . .

> the First Amendment. Common sense and proper respect for the constitutional commitment of the affairs of state to the legislative and executive branches should deter the judiciary from chasing the right of access rainbows that an advocate's eye can spot in virtually all governmental actions. *Saxbe v. Washington Post*, supra at 872, Powell, J., dissenting.

In the case before this Court, the lower court failed to consider alternative means of communication and did not acknowledge the correctional goals of maintenance of internal security and rehabilitation. It paid lip service to *Pell* by noting that prisoners retain certain First Amendment rights. It said no more.

The security interests appearing in the record of this case have already been set out and it is unnecessary to discuss them in depth here. Briefly, it should be noted again that the inmate Union will create friction between inmates and staff.[12] Long term inmates with different interests than short term inmates might force their interests on others creating a possibly uncontrollable situation.[13] Thus, some inmates will

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[12] See Edwards v. Sard, 250 F Supp. 977, 981 (1966).

[13] In *Paka v. Manson*, supra at 119-120, the Court summarized the testimony of John R. Manson, Commissioner of Corrections in Connecticut, as follows:

> Commissioner Manson was strongly opposed to the formation of a prisoners' union at Somers. Based upon his experience as Commissioner and his observations. . . he was of the opinion that inmates serving long sentences would exert undue influence over short term prisoners and would act as self-appointed 'power brokers' in negotiations with prison officials. Somers is the maximum security prison in the State of Connecticut and contains a higher portion of "violence

become power figures with special authority, special rights, and special powers. In short, they will become power brokers capable of imposing their will on the inmates and staff.[14] In addition to all this, logic and common sense lead to the conclusion that if an organization of prisoners has no bargaining power, its only source of strength is militancy.[15]

The security considerations in the record of this case can be compared to those mentioned by California officials in *Pell*. In fact, the security considerations pressed here are even more urgent. Certainly, the "big wheel" becomes a more serious problem where he has a viable organization of soldiers

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cases" than the other detention institution. Every one of the named Plaintiffs in this case are serving long terms, and some may be there for the rest of their lives. (See fn. 16, infra.) The typical inmates, who comprise about ninety percent of the prison population, usually spend no more than twelve months in the prison. In contrast to the long termers, who have little to lose by being obstreperous, these typical inmates are especially cooperative and well behaved in order not to jeopardize their privilege of earning good time and obtaining early release. Their principle interest is to get out as quickly as possible. Because of this difference in the objectives of the two groups, the Commissioner feared not only a distortion of any system of elected representatives in a union, but also the use of pressure, physical coercion, and intimidation against short term prisoners in the organization or operation of a union. While there is no sure way to predict the behavior of prisoners, that there is a valid basis for such fears has been expressly recognized by the Court in *Wolff v. McDonnell*, 418 supra at 560.

[14] See fn. 10, supra.

[15] See fn. 18 in *Paka v. Manson*, supra at 123. Cf. *Blue v. Hogan*, supra.

to support him and enforce his demands. Still, the Three Judge Court gave no weight to these considerations.

The Union presses its constitutional right to petition the government and speak out on issues formally. Significantly, prisoners also asserted such a right to petition for redress of grievances in *Pell*. In reply to this contention, this Court noted that "the alternative means of communication with the press that are available to prisoners, together with the substantial access to prisons that California accords the press and other members of the public, satisfied whatever right the inmates may have to petition the government through the press." *Pell*, supra, fn 6 at 828-39. As noted in fn. 11, the State of North Carolina provides these alternative means. Inmates are allowed to write to anyone, including members of the press and government officials. They may have visitors consistent with security requirements. Reporters are allowed to interview specific inmates subject only to time, place, and manner restrictions. Inmates are provided with an internal grievance mechanism subject to scrutiny by an outside Inmate Grievance Commission and judicial review by the state courts. For these reasons, unless *Pell v. Procunier* is to be overruled, this Court must decide in favor of the State in this case.

The lower court and the Union make much of the fact that there was not "one scintilla of evidence" to indicate that the Union would pose an immediate danger to security. Apparently, the Three Judge Court would have the state await an overt act, a disturbance such as the riot that occurred at Central Prison in 1968 before squelching the Union. Since the Union members had not been allowed to meet or solicit, no such evidence was available. The Union had not been able to establish a power base. More important, *Pell* does not require the State to obtain "evidence" before acting. After "evidence" is obtained, security precautions have already been broken down. *Pell* recognized legitimate security interests

raised by prison officials. The Three Judge Court did not. Its failure was unmistakably erroneous.

(C) THE DECISION OF THE THREE JUDGE COURT IS CONTRARY TO OTHER CASES INVOLVING PRISONERS' RIGHT TO ASSOCIATE DECIDED BEFORE AND AFTER PELL.

Additional guidance in making an analysis of whether the restriction challenged in this case is inconsistent with status as a prisoner may be derived from other cases adjudicating the legality of restraints on the associational rights of prisoners. In upholding the dismissal of the prisoner's action alleging that his right to privacy was violated by monitoring his conversations with prisoners, the Court in *Christman v. Skinner*, 468 F. 2d 723, 726 (2nd Cir. 1972), quoted from *Lanza v. New York*, 370 U. S. 139, 143 (1962), " 'that a jail shares none of the attributes of the privacy of a home, an automobile, an office or hotel room.' " Protection of privacy does not extend to the inmates of a prison confined there after a due process determination that they have violated criminal laws and conviction of crime carries not only loss of liberty, but other impairments associated with membership in a closely supervised prison community. The range of free activity for prisoners within the prison is relatively small. Despite the prominence of the right of association among the constitutional rights enjoyed by citizens, it is clear that a convicted felon, even after he has been released from prison on parole, may have substantial restrictions placed upon his associational relations with other persons. In illustrating the extent to which a parolee's liberty may be curtailed, the Court in *Hyser v. Reed*, 318 F. 2d 225, 239 (D. C. Cir. 1963) said:

> The United States cannot constitutionally impair a citizen's right to leave the District of Columbia or frequent pool halls, but it can do so to Hyser and other appellants [parolees] whose freedoms have been substantially abridged in accordance with the requirements of due process.

Freedom to worship collectively which is an associational right explicitly protected by the Free Exercise Clause of the First Amendment may be curtailed if it threatens prison discipline or security. *Sharp v. Sigler*, 408 F. 2d 966 (8th Cir. 1969); *Knuckles v. Prasse*, 302 F. Supp. 1036, 1056-1058 (E. D. Pa. 1969), aff'd, 435 F. 2d 1255 (3rd Cir. 1970), cert. denied, 403 U. S. 936 (1971).

Perhaps the best example of this type of legitimate curtailment occurred as a result of prisoners' efforts to organize the Church of the New Song or CONS. The history of CONS is reviewed in detail in *Theriault v. Carlson*, 339 F.Supp. 375 (N.D. Ga. 1972) and *Theriault v. Carlson*, 495 F. 2d 390 (5th Cir. 1974). CONS was founded by federal prisoners Harry W. Theriault and Jerry M. Dorrough, at the federal prison at Atlanta, Georgia. Theriault acquired his Doctor of Divinity Certificate through a mail order application. He then appointed himself as "Bishop of Tellus" and ordained Dorrough as "First Revelation Minister." In extensive hearings in the Northern District of Georgia, Theriault and Dorrough testified at length in regard to the source, history, and tenets of CONS, acknowledging that Theriault had started it off as a game. The statement of Dorrough quoted in *Theriault v. Carlson*, supra at 394, relative to the basic purpose of CONS is as follows:

> In our Free Exercise Seminars, our revelation ministry is basically to destroy the Nicolaitans which we believe are the repressive rulers and the powercrats of the system. That means–meaning the prison system, the people in the prison system, the people in the parole system, the people in government in general, the judiciary, et cetera. And we believe in destroying them or changing their minds with the power of our mouth.

The United States Court of Appeals for the Fifth Circuit reviewed the holding of the district court in *Theriault v. Carlson*, 339 F. Supp. 375 (N. D. Ga. 1975) and remanded with instructions to the Court "to decide whether the beliefs professed by [the prisoners] are sincerely held and whether they are in [their] own scheme of things, religious." On remand, the district court in *Theriault v. Silber*, 391 F. Supp. 578 (W. D. Texas 1975) held that CONS is not a religion within the scope of the First Amendment and is not entitled to First Amendment protection as a religion. In reaching its holding the district court stated:

> The Church of the New Song appears not to be a religion, but rather as a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities but for the attempts which have been and are being made to classify them as "religious" and, therefore, presumably protected by the First Amendment.
>
> Rather than urging upon its followers any particular theology or philosophy of life, the Church of the New Song appears to encourage a relatively non-structured free-form, do-as-you-please philosophy, the sole purpose of which is to cause or

> encourage disruption of established prison discipline for the sake of disruption. Disruption of and/or problems for prison authorities is not the *result* of this co-called religion; it is rather the underlying *purpose* of it . . .
>
> Petitioner and his cohorts have formed an organization whose purpose is to improve the position of member prison inmates vis-a-vis the prison administrations. To obtain leverage for the organization and to enable it to operate more freely within the Federal Penitentiaries, petitioner has christened it a "religion" and endowed it with the trappings thereof. Thus, it is that the unmistakeable stench of the skunk is found emanating from that which petitioner has declared a rose.

Interestingly, Wayne Brooks, Frank Strader, and Vernon Rich, who identify themselves as members and organizers of the North Carolina Prisoners' Labor Union in the Union's Newsletter No. 1 attached to its Complaint, filed a lawsuit in the Eastern District of North Carolina alleging that they had rights to meet and organize as the Church of the New Song. Brooks alleged that he had been ordained as a "Revelation Minister" by the Atlanta Branch of CONS. The Honorable Algernon Butler, Senior District Judge, granted the State's Motion for Summary Judgment.[16] *Brooks v. Edwards*,

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[16] In *Brooks*, W. L. Kautzky, Deputy Director of the North Carolina Division of Prisons presented the following information concerning the background of Brooks, Rich and Strader in a sworn Affidavit:

> Mr. Wayne Brooks began his contact with the Criminal Justice System in 1951, and has since graduated through a variety of serious offenses ranging from violations of the Narcotic Act to Breaking and Entering and Safecracking. The F. B. I. record encompasses four pages with prison records.

74-362-CRT (E. D. N. C. 1975). The District Court's Memorandum Decision quoted from *Theriault v. Silber*, supra,

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He was in prison in Georgia, paroled, and revoked after absconding. He was later sentenced in North Carolina for Breaking, Entering and Larceny, and Possession of Burglary Tools. He was paroled in North Carolina, absconded to Florida, where he received a 20 year sentence for Grand Larceny. He escaped after seven years and returned to North Carolina where he was convicted of Possession of Burglary Tools and received 10 years. He claims an active interest in program participation and has laid claim to a Constitutional right to rehabilitation. His claim is that the detainer from the State of Florida prevents his rehabilitation. In April 1974, Mr. Brooks was found guilty by a Disciplinary Committee of stabbing another inmate and was found guilty of disobeying a prison offical in October of 1974. When he was transferred to Central Prison after the stabbing incident, a knife was found hidden in a secret compartment of a jewelry box he had in his possession. Mr. Brooks identifies himself in certain newspaper articles as the president of the North Carolina Inmate Labor Union. Based on this cross section of demonstrated behavior during incarceration, it is most difficult to view his participation or interest in the Church of the New Song as a credible goal.

Mr. Rich began a life sentence for First Degree Murder in May of 1969, and apparently developed an interest in the Church of the New Song upon returning to Central Prison following an escape in April of 1974. As an index of Mr. Rich's trustworthiness, he was able to remain in Honor Grade only ten months before escaping to Atlanta, Georgia. When Mr. Rich entered the Correctional System in 1969, he disclaimed any direct relationship with a religious body. During the time which subject was known to the writer personally while housed at the Mecklenburg II Subsidiary, no interest in religious activity was suggested or intimated. The

indicating that the purpose of CONS was to form an organization that "would be unlawful and/or reasonably disallowed by various prison officials." If prison administrators can prohibit formation of a "Church of the New Song," they can certainly prohibit a prisoners' labor union.

II. THE STATE'S REFUSAL TO PERMIT MEETINGS AND SOLICITATION OF MEMBERS BY THE NORTH CAROLINA PRISONERS' LABOR UNION DID NOT DEPRIVE THE UNION OF EQUAL PROTECTION OF THE LAWS.

In *Ross v. Moffitt*, 417 U. S. 600, 612 (1974), this Court said:

> "Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal

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genesis of Mr. Rich's interest in religious activities would appear to be specifically related to the development of an organization for the purposes of confrontation with prison administration.

Mr. Strader began his contact with the Criminal Justice System in 1959, and has progressed through various federal violations (Dyer Act) which eventuated in a Second Degree Murder charge in 1969, resulting in a 25-30 year sentence. In June 1970, Franklin Strader held a gun on a correctional officer in a hijack of a prison bus in an escape. Mr. Strader escaped in April of 1974... His prior record suggests two previous escapes, a period of Indefinite Nonpunitive Segregation and four major infractions during an approximately five year period...

> protection analysis may be pressed without doing violence to the principles recognized in other decisions of this Court. The Fourteenth Amendment 'does not require absolute authority or precisely equal advantages.' "

Although *Ross* is set in a different context, the conclusion reached is equally applicable here. As we have clearly indicated, the holding of the Three Judge Court is totally inconsistent with *Pell v. Procunier*. For that reason alone, the Union's equal protection claim is without merit.

The State differentiated between the North Carolina Prisoners' Labor Union and the Jaycees, Alcoholics Anonymous, and the Boy Scouts of America because these organizations had recognized rehabilitative purposes. As Director Edwards testified in his affidavit:

> The Complaint charges that the Inmate Labor Union is denied equal protection of the laws in that the Junior Chamber of Commerce and Alcoholics Anonymous are permitted within the prison system. I should first point out that these are the only two private organizations which are allowed to function in the North Carolina Prison system. They are permitted to operate because they have been found to demonstrate legitimate rehabilitative purposes and to fill the needs of the inmates. They both operate under specific guidelines and their activities are regulated.
>
> * * *
>
> The goal of the Alcoholics Anonymous Program is also adapted from the program structure of an organization outside the confines of the prison system. The objectives of the Alcoholics

> Anonymous program are to provide therapeutic support, insight, and an opportunity for productive sharing of experiences among those who have encountered the deteriorative effect of alcoholism. Alcoholics Anonymous is structured on a peer pressure basis which begins while the individual client is confined and is intended to have carry-over effects into Alcoholics Anonymous groups in the free community.
>
> Prior to the development of Alcoholics Anonymous programs, it was necessary that the design of the program and the intended goals were justifiable within the confinement facilities of this State. The goals and the objectives of both the Alcoholics Anonymous and the Jaycee program were presented to correctional staff as meaningful courses of action with positive goals relative to productive restoration of offenders to active, lawful participation in the community. The goals of both organizations were scrutinized, evaluated, and approved. Operational guidelines have been drawn up in each instance following approval to certify that the primary objective of the correctional system—to maintain order and security—would not be abridged by the operation of these programs within the confines of the prison units. (A pp. 124-126).

The potentially destructive purposes of an inmate union have been noted. Again, even if a union might be originally intended as a peaceful way of channeling grievances, it can quickly become violent. Where an organization has no power, the inevitable result is collective action—a strike or a more serious disturbance. Nevertheless, the lower court upheld the Union's claim that since the State allowed the Jaycees,

Alcoholics Anonymous, and the Boy Scouts of America to function within its prisons, it must also allow the prisoners' union. It would apparently require the State to prohibit useful rehabilitative programs if it wanted to prohibit a prisoners' union or any other "inmate organization." The lower court obviously failed to recognize the Department's rehabilitative goals in spite of the mandate of *Pell* discussed above.

As this Court noted in fn. 10 in *Greer v. Spock*, ____ U. S. ____, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976):

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum . . . The decision of the miliary authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher . . . or a rock musical concert would be supportive of the military mission of Fort Dix did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

The Union also claims that the admission of certain outside groups does compel the admission of others. In *Paka v. Manson*, supra at 124, the Court specifically addressed this particular equal protection issue.

> [a]nother possible equal protection claim is that if certain group activities are permitted within a prison, then it is arbitrary and capricious not to permit inmates to engage in any other kind of group activity they may choose. However, organizations like the Jaycees which are allowed to meet within the prison have functions which are different from those of the proposed union. The

> Jaycees at Somers conduct charity drives and assist in maintaining the canteen. The specific purpose of the proposed union is to bring to the surface, for collective action, grievances and complaints of the prisoners. The restriction on a state not to deny equal protection does not leave it without permission 'to recognize degrees of harm' and to 'confine its restrictions to those classes of cases where the need is deemed to be clearest.' Being allowed to participate in a permitted kind of group activity is not to be equated with participation in making the determination of what group activities shall be permitted. The nature of the organization of the proposed union, and its contemplated purpose of direct participation with prison authorities in shaping administrative policy, provides a reasonable basis for distinguishing the activities of the proposed union from the kind of inmate participation afforded in the Jaycee program.

Thus, the Court found the claim was not meritorious. Yet the Three Judge Court would require the State to develop "evidence"–i.e., concrete facts to indicate that an organization was dangerous, before barring it. Again, that logic is fundamentally inconsistent with *Pell* and numerous other cases decided by this Court. Cf. *Paka v. Manson*, supra; *Blue v. Hogan*, supra.

III. THE STATE'S REFUSAL TO ALLOW MULTIPLE DISTRIBUTION OF THE NEWSPAPER OF THE NORTH CAROLINA PRISONER'S LABOR UNION WAS NOT UNCONSTITUTIONAL.

The lower court also upheld the Union's claim that since Alcoholics Anonymous and the Jaycees were allowed full meeting privileges, the Union also had to be allowed to have

such privileges. For the reasons stated above, this equal protection claim is also without merit. The Union has no right to actively function within a prison. *A fortiori*, it has no right to distribute its leaflets.

It should also be noted that this Court specifically excepted "mass mailings" from its decision recognizing the rights of outsiders to communicate with prison inmates. See *Procunier v. Martinez*, 416 U. S. 396, 408, fn 11 (1974). The Court recognized "that different considerations come into play there." Although this Court said that it intimated no view on the subject, it appears unlikely that it would have bothered to specifically except "mass mailings" unless stiffer standards would be applied under these circumstances. Otherwise, there is no reason at all for making an exception. The security problems that can result from "mass mailing" as opposed to "piece mail" are apparent. First, material mailed in mass obviously makes inspection more difficult and facilitates mailing of contraband. Second, and more important here, material that could not be considered a threat to order and security when communicated to one inmate, often becomes a legitimate threat when passed throughout the inmate population. Widespead circulation of publications can provide a base for collective action such as strikes or riots. In *Paka v. Manson*, supra at 126, the Court held that prison officials could prevent mass mailing of leaflets.

> Stencils or multiple copies of [Union materials] could only have been intended for distribution among inmates within the prison and as a tool towards organization of a union that I have already held may be properly prohibited by the prison authorities. To the extent that multiple copies necessarily imply distribution to a group, they involve different risks to the security of the institution than the individual prisoner reading the by-laws of the prison union in his cell. It is true, of course, that both activities look toward a goal which has been properly prohibited—the formation of a prisoners' union. However, the activity that involves distribution to a group, raises much more forcefully the risk of agitation and unrest that prison administrators may legitimately seek to combat.

Finally, published personal attacks on correctional officers are much more likely to set apart inmates and officers than letters. Officers do not know what letters contain, but they do read publications and these can cause confrontations. As noted, in prisons, "guards and inmates coexist in intimate contact. Tension between them is unremitting. Frustration, resentment and despair are commonplace." *Wolff v. McDonnell*, supra, at 560. Thus, libelous publication of fighting words can and do provoke violence.

Finally, as Mr. Justice Stewart points out in *Greer v. Spock*, supra:

> The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."

CONCLUSION

The problems of prison management have been properly described as "complex and intractable, * * * not readily susceptible of resolution by decree," a fact which finds expression in "a broad hands-off attitude towards problems of prison administration" as adopted "traditionally," by "federal courts." *Procunier v. Martinez*, supra. After all, "courts possess no expertise in the conduct and management of correctional institutions." *Finney v. Arkansas Board of Correction*, 505 F. 2d 194 (8th Cir. 1974). Because of this want of judicial expertise, "prison officials must be accorded latitude in the administration of prison affairs," *Cruz v. Beto*, 405 U. S. 319 (1971) *Frazier v. Ciccone*, 506 F. 2d 1022 (8th Cir. 1974), and their judgments are entitled to "great weight" *Ross v. Blacklege*, 477 F. 2d 616 (4th Cir. 1973). Particularly "[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Procunier v. Martinez*, supra.

It is submitted that the decision of the Three-Judge District Court in this case is a misreading of *Pell v. Procunier*, supra, and *Cruz v. Beto*, supra. Moreover, it is contra to *Paka v. Manson*, supra and *Blue v. Hogan*, supra. In holding the First Amendment and the Equal Protection Clause of the Fourteenth Amendment applicable to the facts of this case, the District Court has emasculated the administrative discretion of prison authorities and created an intolerable situation in which they must exercise their responsibilities.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Jacob L. Safron
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Ben G. Irons, II
Associate Attorney

APPENDIX

5. Prisoners Should Be Encouraged To Organize For The Right To Collectively Bargain For Better Conditions, Higher Wage Scales, And For Their Own Personal Well-Being.

AUTHORIZATION FOR REPRESENTATION
By The
N. C. PRISONERS' LABOR UNION
835 West Morgan Street
Raleigh, North Carolina 27603

Having jurisdiction over the classification of work done by me:

Name _____ Address _____

Number _____ Prison Unit Number _____

Class of Work Done _____

VERIFICATION

I hereby authorize the agents or representatives of said Union to represent me and to act as a collective bargaining agent in all matters pertaining to rates of pay, hours of employment and all other terms and conditions of incarceration.

Date _____ Signature _____

Please mail this authorization slip to the Union's outside post office box as follows: N. C. Prisoners' Union, P. O. Box 2842, Durham, N. C. 27705